In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1009

CLEAR GRAVEL ENTERPRISES, INC., PETITIONER

v.

NOLAN KIEL, STATE DIRECTOR, BUREAU OF LAND MANAGEMENT, STATE OF NEVADA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The United States Department of Interior's Board of Land Appeals held two of petitioner's mining claims null and void for lack of discovery of a valuable mineral. The district court upheld the Secretary's decision and the court of appeals affirmed *per curiam* (Pet. App. B). The only issue raised by petitioner is whether the court of appeals erred in failing to follow, or at least discuss, a later case decided by the Board of Land Appeals in favor of a claimant on allegedly similar facts.

The two sand and gravel claims at issue here are near Las Vegas, Nevada, and were located in 1946. Petitioner was therefore required to show that as of July 23, 1955, when common sand and gravel deposits became no longer

locatable (30 U.S.C. 611), the material on petitioner's claim could have been profitably mined and marketed on this date, as required for patenting under 30 U.S.C. 29. See *United States* v. *Coleman*, 390 U.S. 599, 602. As the court of appeals held, the evidence fully supports the Secretary's decision that the material on petitioner's two claims did not constitute valuable minerals as of the relevant date (Pet. App. B, 3b-6b).

Petitioner contends, however, that the Board of Land Appeals decision in *United States* v. *Gibbs*, decided November 21, 1973 (Pet. App. F), decided after the administrative decision here, should have been considered by the court of appeals (Pet. 7-8). Of course, the mere fact that the court below did not cite *Gibbs* does not show that it failed to consider the case. Moreover, in *Gibbs*, which involved another sand and gravel claim in the Las Vegas area, the claim was permitted to go to patent because of a factual situation different from that involved here. In *Gibbs* there was specific evidence of the economic factors that would have been involved in mining the subject claim; unlike here, there was evidence that a road had been constructed to the area of the claim and that an immediately adjacent claim was being profitably mined in a manner indicating that work would soon extend onto the subject claim; and there was evidence that the specific material available from the subject claim, because of its excellent accessibility, would have been acceptable in the market (Pet. App. F, 17f-21f, 29f). By contrast, in the instant case there was no compar-

able evidence,[1] only general indications that sand and gravel was being sold in the Las Vegas area. Thus the two cases simply represent different outcomes based on a correct application of undisputed principles to different factual situations.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.

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[1]As the court of appeals noted (505 F.2d 180, 181; Pet. App. B, 4b):

> * * * the evidence indicates that although * * * [petitioner] had between 1952 and no later than 1956 leased all sixteen claims to the second largest sand and gravel producing company in the area, that company had mined but one of those claims, and the one being mined was neither of the two claims here involved. Other evidence produced at the time of the hearing before the Hearings Examiner further demonstrated that the one mine being operated provided sufficient sand and gravel to meet the needs of the market and that it could yield a sufficient quantity of sand and gravel to provide for any increased share of the market to its producer.

In affirming the Secretary's decision, the court of appeals attributed particular significance to the fact that, as of July 23, 1955, petitioner had not even constructed a road to the two claims (Pet. App. B, 5b; Pet. App. D, 18d-19d). In fact, no sand and gravel was extracted from them until 1963 (Pet. App. D, 18d). The court of appeals also noted the testimony of a valuation engineer and a geologist at the hearing that, in their opinion, the sand and gravel in the claims could not have been extracted and marketed at a profit as of July 23, 1955 (Pet. App. B, 4b-5b).

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